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No. 00-1476

IN THE
Supreme Court of the United States

MICHAEL GONZALES,
Petitioner,

v.

NATIONAL BOARD OF MEDICAL EXAMINERS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Americans with Disabilities Act ("ADA") defines "disability" as a "physical or mental impairment that substantially limits one or more of the major life activities." 42 U.S.C. § 12102 (1994). Title III of ADA prohibits discrimination in the administration of licensing examinations, 42 U.S.C. § 12189 (1994), while Title I of ADA covers employment discrimination claims. 42 U.S.C. § 12112 (1994). This case arises under Title III.

The Department of Justice ("DOJ"), which was charged with issuing regulations under Title III, and the EEOC, which was charged with issuing regulations under Title I, both defined "major life activities" to include the purported life activity of "working." *See* 28 C.F.R. § 36.104 (2000) and 29 C.F.R. § 1630.2(i) (2000). However, the DOJ and EEOC adopted different definitions of the term "substantially limits," insofar as that term applies to the purported life activity of working. The DOJ regulation states that an allegedly disabled individual's restriction should be compared to the abilities of "most people," 28 C.F.R. pt. 36, App. B at p. 621 (2000), while the EEOC regulation states that the comparison should be to "the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i) (2000).

Thus, this case presents the following questions:

1. Whether the DOJ validly defined "major life activities" to including the concept of working.

2. Assuming working is a major life activity, whether the term "substantially limits" in Title III must be interpreted in the same fashion as the EEOC's Title I definition of "substantially limits" applicable to the major life activity of working.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent states that it is a not-for-profit corporation and has no parent company and no publicly-traded company owns ten percent or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATUTORY AND REGULATORY PROVISIONS..	1
STATEMENT OF THE CASE.....	2
ARGUMENT	4
CONCLUSION	10

TABLE OF AUHORITIES

CASES — Page

Bartlett v. New York State Board of Law Examiners, 2 F. Supp.2d 388 (S.D. N.Y. 1998) 9
Bartlett v. New York State Board of Law Examiners, 156 F.3d 321 (2nd Cir. 1998), *vacated*, 527 U.S. 1031 (1999) 5, 9
Bartlett v. New York State Board of Law Examiners, 226 F.3d 69 (2nd Cir. 2000) 4, 5, 6, 8, 9
Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) 9
Burns v. Coca-Cola Enterprises, Inc., 222 F.2d 247 (6th Cir. 2000) 7
Duncan v. Washington Metropolitan Area Transit Authority, 240 F.3d 1110 (D.C. Cir. 2001) 7
EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999) 7
Goharderakshan v. National Board of Medical Examiners, No. 98-0648-CV-W-4 (W.D. Mo. June 11, 1998) 6
Hallstrom v. Tillamook County, 493 U.S. 20 (1989) 8
Kellogg v. Union Pacific Railroad Co., 233 F.3d 1083 (8th Cir. 2000) 7
Mullins v. Crowell, 228 F.3d 1305 (11th Cir. 2000) 7
Price v. National Board of Medical Examiners, 966 F. Supp. 419 (S.D. W.Va. 1997) 6, 9
Rodriguez v. United States, 480 U.S. 522 (1987) .. 8
Sinkler v. Midwest Property Management, Ltd., 209 F.3d 678 (7th Cir. 2000) 7
Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) 4, 6-7
United States v. Goldenberg, 168 U.S. 95 (1897)... 8

TABLE OF AUHORITIES—Continued

STATUTES AND OTHER AUTHORITIES	Page
42 U.S.C. § 12102 (1994)	i
42 U.S.C. § 12112 (1994)	i
42 U.S.C. § 12189 (1994)	i
28 C.F.R. § 36.104 (2000)	i, 1-2
28 C.F.R. pt. 36, App. B (2000)	i
29 C.F.R. § 1630.2(i) (2000)	i, 2
29 C.F.R. § 1630.2(j) (2000)	1
29 C.F.R. § 1630.2(j)(3)(i) (2000)	i
29 C.F.R. § 1630.3(j) (2000)	1

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RESPONDENT'S BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Respondent, National Board of Medical Examiners ("NBME"), submits this brief in support of the petition for writ of certiorari filed by the Petitioner, Michael Gonzales.

STATUTORY AND REGULATORY PROVISIONS

In addition to the statutory and regulatory provisions set forth in the Petition,[1] Respondent submits that the following provisions are also relevant:

> The DOJ's Title III regulations define "major life activities" as follows:
>
> > The phrase *major life activities* means functions such as caring for one's self, performing manual

[1] Petitioner's citation on pages 3 and 4 of the Petition to 29 C.F.R. §1630.3(j) is incorrect. The correct citation is 29 C.F.R. §1630.2(j).

> tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

28 C.F.R. §36.104 (2000) (emphasis in original).

The EEOC has adopted an identical definition of "major life activities" under Title I. 29 C.F.R. §1630.2(i) (2000).

STATEMENT OF THE CASE

The NBME is a not-for-profit corporation that develops and administers the United States Medical Licensing Examination ("USMLE"). *See* Joint Appendix filed in Court of Appeals at 1, 3, 661-62 (hereinafter "JA"). The USMLE consists of three parts, designated as Step 1, Step 2 and Step 3. JA 622. The USMLE is accepted by all fifty-four United States licensing jurisdictions for purposes of the examination requirement for medical licensure. JA 662. Qualified individuals take the various Steps at different points of their medical education, with Step 1 generally taken after the second year of medical school. JA 673-74.

Step 1 is a multiple-choice examination, where the student must answer questions after first reading information consisting of a single sentence or short vignettes. JA 665. Since May 1999, Step 1 has been administered on computer as a one-day examination and has been generally available six days a week throughout the year. JA 665. Although NBME places no limitation on the number of attempts a medical student can make to pass any Step of the examination, it does limit to three the number of times an applicant can take a given Step in a twelve-month period. JA 666, 665. NBME does not set a passing score for USMLE examinations, but rather, a passing score is recommended to the state medical licensing authorities. JA 666-67.

Medical students wishing to take Step 1 are informed of their ability to seek testing accommodations for disabilities covered by ADA. JA 659-60, 674-75. An applicant seeking

accommodation is required to submit documentation supporting the alleged disability as well as the accommodation that he or she is requesting. JA 676. In the majority of cases, NBME sends the documentation submitted to an independent expert to review such requests. JA 676. After reviewing the information submitted by the applicant, the independent expert submits a report to NBME and a determination is made as to whether the examinee is disabled under ADA and, if so, what accommodation should be provided. JA 676. In determining whether or not to grant accommodations, NBME does not attempt to make a diagnosis of the student; rather, it reviews the documentation submitted by the student to determine whether it supports the asserted diagnosis and the requested accommodation. JA 677-78.

As noted in the Petition, the instant case arose when Petitioner's third request for an accommodation to take Step 1 was denied by Respondent. Petitioner filed this suit, contending that he was disabled because he was substantially limited in the major life activities of reading, learning and working. App. 46a, 51a. After an evidentiary hearing, the district court denied Petitioner's request for a preliminary injunction because Petitioner could not demonstrate he was disabled for purposes of ADA. App. 39a-54a. Citing the DOJ's Title III definition of "substantially limits," the district court found that Petitioner's ability to read and write, as measured by his treating psychologist, "fell within the average to superior range when compared to most people." App. 49a. As for Petitioner's claim that he was substantially limited in the major life activity of working, the district court declined to evaluate Petitioner's claim under the EEOC Title I definition of "substantially limits" for the major life activity of working. App. 52a-53a.

On appeal, the Sixth Circuit affirmed in a 2-1 decision. App. 1a-38a. In evaluating Petitioner's claim that he was disabled in the major life activity of working, the Sixth

Circuit also declined to import into Title III the EEOC Title I definition of "substantially limits" for working, finding no evidence in the Title III regulations that the DOJ intended to incorporate the Title I standard into its regulations. App. 23a-24a. The Sixth Circuit also found Petitioner's claim based on the major life activity of working to be "problematic" given this Court's *dicta* in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999), questioning whether working could be included in the definition of "major life activities." App. 25a. According to this Court in *Sutton*, there was a conceptual difficulty in treating working as a major life activity, given the circular nature of arguing that the exclusion from working constituted a disability when "the question you're asking is, whether the exclusion itself is by reason of handicap." *Id.* at 492.

ARGUMENT

NBME believes the Court should grant certiorari in this case to resolve the important issues presented by the Sixth Circuit's decision in this case and the Second Circuit in *Bartlett v. New York State Board of Law Examiners*, 226 F.3d 69 (2nd Cir. 2000), but not for the reasons Petitioner offers. Rather, certiorari should be granted for the following reasons:

First, given the overriding interest in safeguarding the public with respect to individuals who wish to become licensed to practice medicine in the United States, this Court should clearly articulate the applicable standards for evaluating requests for accommodations under Title III of ADA. While Respondent believes that the true distinction between the Sixth Circuit's decision here and *Bartlett* is a function of the different relation Step 1 has to the concept of working (*see infra*), the conflicting legal analyses in the two cases clearly promote, rather than minimize, the likelihood of future litigation over the issue. Specifically, the *Bartlett* decision will encourage future Title III litigants to include working among the major life activities they claim to be at

issue to invoke the more favorable definition of "substantially limits" the EEOC promulgated under Title I for that purported life activity.

Indeed, the potential for increased litigation in all United States jurisdictions where Respondent administers Step 1 is further enhanced by the rationale underlying the *Bartlett* decision. *Bartlett* incorporated the Title I definition of "substantially limits" into Title III in the interest of promoting a consistent interpretation throughout ADA. *Bartlett*, 226 F.3d at 82-83. The rationale underlying that conclusion creates a slippery slope that will encourage plaintiffs in future cases arising under Title III to argue that ***all*** major life activities—not just the purported major life activity of working—should be evaluated under the Title I standard for working as an alleged means of promoting a consistent interpretation of the term "substantially limits" throughout ADA. Indeed, this was the extreme position advocated by the DOJ in its initial *amicus* brief to the Second Circuit in *Bartlett*. *See* Brief for *amicus curiae* The United States at 16-17, 25-28, *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321 (2nd Cir. 1998) (No. 97-9162), *vacated*, 527 U.S. 1031 (1999) (mem.). While the Second Circuit did not adopt this view, its analysis in *Bartlett* would not preclude future litigants from advancing such claims.

Thus, unless this Court definitively addresses which interpretation of Title III's "substantially limits" definition is correct, the current state of the law will subject Respondent to increased litigation over whether requested accommodations should be granted. Respondent obviously recognizes its obligations to provide reasonable accommodations to individuals with disabilities, and has no vested interest in whether any particular individual is granted an accommodation in connection with Step 1 of the USMLE. However, unless Respondent has clear and definitive guidance on how requests for accommodations should be

evaluated, the integrity of the licensing examination it administers may be compromised. As a consequence, the public interest is threatened to the extent medical students who are not disabled receive accommodations and thereafter choose to become licensed as medical doctors.

Courts have repeatedly recognized the critical public interest implicated by Respondent's administration of a licensing examination that retains the highest levels of integrity. *See Goharderakshan v. National Board of Medical Examiners*, No. 98-0648-CV-W-4 at 7-8 (W.D. Mo. June 11, 1998) (in denying motion for TRO, court held that "[b]ecause the NBME is charged with administering the examinations required for licensing, it is necessarily responsible for protecting the public"); *Price v. National Board of Medical Examiners*, 966 F. Supp. 419, 422 (S.D. W.Va. 1997) (granting testing accommodations to persons not disabled under ADA "would allow persons to advance to professional positions through the proverbial back door," thereby undermining the integrity of the USMLE). In order to maintain the highest levels of test integrity, while at the same time meeting its obligations to accommodate individuals disabled under ADA, Respondent submits that this Court should address the tension between this case and *Bartlett* to provide uniform guidance on the meaning of "substantially limits" under Title III to licensing organizations throughout the United States. In that regard, Respondent does not believe this is the type of issue that should be allowed to "percolate" given the obvious value in maintaining a uniform standard for evaluating requested accommodations.

Finally, Respondent submits that this case squarely presents the issue of whether working may be properly considered a major life activity under ADA, a concept this Court questioned in *dicta* in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999). To the extent working is not a major life activity, the EEOC's definition of "substantially

limits" for working is invalid and can have no application to Petitioner's claim.

Since this Court made the above observation in *Sutton*, the lower courts have continued to grapple with this question, but, unfortunately, most courts have declined to substantively address this issue, choosing instead to assume *arguendo* that working is a major life activity. *See Duncan v. Washington Metropolitan Area Transit Authority*, 240 F.3d 1110, 1114 n.1 (D.C. Cir. 2001) (assuming *arguendo* that working is a major life activity); *Kellogg v. Union Pacific Railroad Co.*, 233 F.3d 1083, 1087 (8th Cir. 2000) (same); *Mullins v. Crowell*, 228 F.3d 1305, 1312-13 (11th Cir. 2000) (court reverses district court conclusion that working is not a major life activity; given that Court in *Sutton* did not resolve issue, court adhered to its prior precedent finding working to be a major life activity); *Burns v. Coca-Cola Enterprises, Inc.*, 222 F.2d 247, 255 (6th Cir. 2000) (court concludes that working "is generally accepted as a major life activity . . ."); *Sinkler v. Midwest Property Management, Ltd.*, 209 F.3d 678, 685 n.1 (7th Cir. 2000) (court will continue to apply prior precedent recognizing working as a major life activity "until the Supreme Court definitively excludes working as a major life activity . . ."); *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 654 (5th Cir. 1999) (court definitively concludes that working is a major life activity). To the extent courts continue to defer resolution of this issue pending further guidance from this Court, *see*, *Sinkler*, *supra*, litigants will consume valuable judicial resources pursuing this issue without receiving any definitive guidance.

As for the reasons offered by Petitioner, NBME disputes Petitioner's suggestion that a purported need for "internal consistency" between the EEOC and DOJ regulations warrants review by this Court of the results reached by the Sixth Circuit in this case and the Second Circuit in *Bartlett*. In this case, the Sixth Circuit, in accordance with well-

established rules of statutory construction, concluded that had the DOJ wished to adopt a different definition for the term "substantially limits," insofar as it related to the purported major life activity of working, it could have expressly done so, as did the EEOC for claims arising under Title I. *See* App. 24a. As the Sixth Circuit succintly noted, the DOJ's silence on this point is dispositive of the issue. *Id. See also United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897) ("The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used . . . No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute"); *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) ("it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers a statute's primary objective must be the law. Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history . . . '[there is no occasion] to examine the additional considerations of 'policy' that may have influenced the lawmakers in their formulation of the statute'" (citations omitted) (emphasis original)); *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989) (rejecting petitioner's argument that statute should be given a "flexible" or "pragmatic" construction; "We are not at liberty to create an exception where Congress has declined to do so").

While, as a general proposition, uniform interpretation of a term throughout a statutory scheme is a laudable policy, it cannot be used to bootstrap a definition enacted by the EEOC for use under Title I into the regulatory scheme enacted by the DOJ under Title III, absent some indication (of which

there is none) that the DOJ intended to incorporate that definition into its Title III regulations.[2]

As for the claimed conflict between the Sixth Circuit's decision in this case and *Bartlett*, Respondent submits that the divergent outcomes in these two cases are driven as much by the facts of each case as they are driven by the differing legal analyses adopted by each court. In concluding the major life activity of working was implicated by the bar examination, the district court in *Bartlett* held the bar examination was the "only obstacle" between the plaintiff in that case and the practice of law. *Bartlett v. New York State Board of Law Examiners*, 2 F. Supp.2d 388, 393 (S.D. N.Y. 1998). In so holding, the district court specifically distinguished the bar examination from the test at issue in this case. *Id., distinguishing Price v. National Board of Medical Examiners*, 966 F. Supp. 419 (S.D. W.Va. 1997). Thus, Respondent respectfully submits that the true conflict between the Sixth Circuit's decision here and *Bartlett* turns more on this critical factual distinction, as opposed to the particular legal analysis used to assess each claim. Nonetheless, as noted *supra*, the potential risk to the integrity of the USMLE as a licensing

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[2] As an *amicus* in the *Bartlett* litigation, the DOJ suggested that incorporating the Title I definition of "substantially limits" for working was appropriate because the "concept of disability *should* have a uniform meaning." *See* Brief for *amicus curiae* The United States at 16, *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321 (2nd Cir. 1998) (No. 97-9162) (emphasis added), *vacated*, 527 U.S. 1031 (1999). However, the DOJ's *amicus* brief is bereft of citation to any legal principle that would mandate such a result, nor does the DOJ explain where in the Title III regulations it expressly adopted the EEOC definition from Title I. Given the foregoing, the DOJ's policy-based argument in *Bartlett* is entitled to little, if any, deference in this case. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (Court does not defer to "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice"). Moreover, it is unclear whether the DOJ still adheres to the untenable position it articulated several years ago in the *Bartlett* litigation.

examination for medical students administered throughout the United States is of sufficient importance to warrant review by this Court of these issues.

CONCLUSION

Respondent respectfully requests that the Petition be granted for the reasons articulated herein.

Respectfully submitted,

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